BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of: **OMNOVA SOLUTIONS, INC.,** Employer, and **HADEN SELF,** Petitioner, and **UNITED STEELWORKERS INTERNATIONAL UNION and its LOCAL 748L,** Union.	Case No. **26-RD-1182**

Exceptions To The Hearing Officer's Report & Recommendations

Pursuant to Section 102.69 of the Board's Rules and Regulations, the United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO/CLC ("USW" or "Union") hereby follows the following exceptions to the Hearing Officer's Report and Recommendations on Challenged Ballots ("Report"), dated November 2, 2011.

INTRODUCTION

The decertification election here involves the United Steelworkers and its Local 748-L (the Union or USW) at the OMNOVA Solutions, Inc.'s (the Company) facility in Columbus, Mississippi. The USW began representing the unit employees at the Company's Columbus, Mississippi facility in November of 1964 (Report at p. 6).

The parties met in multiple bargaining sessions to negotiate a successor agreement to the most recent collective bargaining agreement on April 27, 2010, and continued bargaining through the May 15 expiration date of the agreement in an attempt to stave off a strike. (Report at p. 6).

On May 21, 2010, one hundred and seventy-four (174) employees began a strike following the CBA's expiration (Report at p. 6). The Company hired approximately one hundred temporary replacement workers. (*Id.*).

The Company notified the Union on September 7, 2010 of their plans to convert the replacements from temporary to permanent replacement status on September 11, 2010. (Report at ps. 6-7). The Union requested a stay of action from the Company until September 18, 2010 to allow members to consider the Company announcement. (*Id.* at p. 7). Without allowing the Union time for a membership meeting, the Company purported to convert the replacement employees (*Id.*).

One of the replacements, Haden Self, filed the instant RD petition. The USW's motion to dismiss was referred to the Regional Director, and denied by the decision of the Regional Director dated June 10, 2011 (Report at p. 2). The USW filed a Request for Review of the Regional Director's June 10, 2011 Decision and Direction of Election raising the legal issues set forth in the instant brief (*Id.*). While the Board, by decision dated July 8, 2011, denied the Request for Review as premature, it noted that its denial was without prejudice to the Union raising the same issues in a post-election petition (*Id.*). This election having taken place by mail ballot from July 8 through July 28, 2011 – with all 314 votes being challenged by the parties (*Id.* at ps. 1-2) -- the USW hereby submits its exceptions to the Report, raising the very same legal issues it raised pre-election.

The USW urges the Board to determine that employees engaged in a strike in excess of twelve months were eligible to vote, and that their ballots should be opened and counted, and that their replacements were not eligible to vote or petition to decertify a unit under the National Labor Relations Act. Substantial questions of law and policy are raised in this case.

A proper and plain reading of the Act, along with Board and Supreme Court decisions, illustrate that the striking Union employees are entitled to vote, while their temporary replacements are not entitled to petition or vote. The Act, at 29 U.S.C. § 159(c)(3) (hereinafter referred to as Section 9), only places limits on striking employees who are *not* entitled to reinstatement (Emphasis added). Because the striking employees are entitled to reinstatement, the twelve-month provision does not apply to them. Further, the temporary replacements are not permanent employees under the Act and are thus not eligible to vote in a decertification election or petition for such. The Board, in Target Rock, 324 NLRB 373 (1997), held that replacement employees are not considered permanent, in spite of language to the contrary, in an employment agreement if, as in this case, the employer retains control over their at-will termination.

EXCEPTIONS

Exception 1

The USW hereby excepts to the Hearing Officer's Findings, Conclusions & Recommendations that the Striking Employees were not eligible to vote and that their ballots should not be opened or counted (Report at ps. 4-5, 15-19, 31).

The Act states at Section 9(c)(3): "Employees engaged in an economic strike *who are not entitled to reinstatement* shall be eligible to vote . . . in any election conducted within twelve months after the commencement of the strike." (Emphasis added). The Board has ignored the inclusion of the reinstatement provision in holding that all employees who engage in economic strikes are barred from voting in decertification elections occurring more than twelve months

after the commencement of a strike. Wahl Clipper Corp., 195 NLRB 634, 635 (1972). Under the reasoning of Member Fanning's dissent in Wahl Clipper, the Board's decision in Laidlaw, infra., and the decision of the Supreme Court in N.L.R.B. v. Fleetwood Trailer Co., infra., it should be determined that the majority interpretation in Wahl Clipper is erroneous and should be overruled.

When the National Labor Relations Act of 1935 (NLRA) was passed, no provision existed regarding the eligibility of economic strikers to vote. The Board was given discretion to determine, on a case-by-case basis, the eligibility of economic strikers. The Labor-Management Relations Act of 1947 (Taft-Hartley Act) was passed as an amendment to the NLRA, and for the first time it included language on the voting eligibility of economic strikers. This amendment instituted a blanket ban on the voting rights of economic strikers. 61 Stat. 136 (1947). This ban was the first use of the phrase, "not entitled to reinstatement," and it was basically understood to mean anyone who had been replaced by a worker was not subject to termination following a strike. Sen. Ball (MN), Con. Rec., Sen., May 13, 1947, p. A2378. Thus, any permanently replaced economic strikers were entirely banned from voting in a decertification election.

In 1959, Congress further amended the NLRA with the Labor Management Reporting and Disclosure Act. One of the listed goals of the Act was to repeal the provision from the Taft-Hartley Act that prohibited economic strikers who have been replaced from voting. U.S. House Rep. No. 741 on H.R. 8342. In order to accomplish this, the language from 1947 was replaced with the current language of Section 9(c)(3). This provision was designed to give the Board discretion as originally allowed in the 1935 version of the Act, but as a compromise, it also created a time limit for voter eligibility IF one was not entitled to reinstatement. Rep. Griffin (MI), Con. Rec., Appendix, September 9, 10, 1959, p. A7882. The most recent amendment went

even further than the original version of the Act to guarantee the right to vote for one year to those who are not entitled to reinstatement.

The importance of this history is that it reveals a labor-friendly progression that illustrates Congress' intent with regards to the voting rights of strikers. Only those economic strikers who are not entitled to reinstatement (permanently replaced with no possibility of returning to work) face any bar to election whatsoever. Sen. Ball (MN), Con. Rec., Sen., May 13, 1947, p. A2378. A reading of the plain language of the statute, in light of the Act's legislative history, reveals that workers who are entitled to reinstatement (any strikers who have not taken positions elsewhere and maintain a claim to their current position) should be entitled to vote in any election at any time.

This broad grant of rights is evidenced in the statement by Senator Kennedy: "Our purpose is to permit economic strikers to vote while there is a lawful strike in progress, a strike for a reasonable and proper purpose, and to permit the Board to adopt a rule of reason in making a judgment as to when it would be wise to terminate the right." Sen. Kennedy (MA), Con. Rec., Sen., April 23, 1959, p. 5864. It is clear that Congress intended the Board to have discretion in providing strikers with the power to vote.

The Board in Wahl Clipper, supra., erroneously disregarded the phrase, "who are not entitled to reinstatement," in the legislative history to conclude that it excludes all economic strikers from voting after twelve months of striking. 195 NLRB at 635. In coming to this conclusion, the majority in Wahl Clipper ignored the plain language and history of the statute and the decisions of Laidlaw, infra. and N.L.R.B. v. Fleetwood Trailer Co., infra.

The well-reasoned dissent of Member Fanning in Wahl Clipper is important for understanding the true purpose of the statute. As Member Fanning argues, the inclusion of the

reinstatement eligibility clause is purposeful and should be given its proper and full effect. Id. The dissent's comparison of economic strikers to employees who are laid-off is instructive. Just as a laid-off employee awaits developments that will lead to the reclamation of a job, so too does an economic striker -- the distinction between what types of developments is irrelevant. Id. at 637. As Member Fanning explained:

> My colleagues read Section 9(c)(3) as denying voting rights to 'replaced former economic strikers' after 12 months from the date the strike commenced even though they have a reasonable expectancy of reemployment in the near future. They seem preoccupied with the time limit, though that was a clear grant of benefit to strikers with no reinstatement rights at all. They give no weight to the precondition spelled out in the statutory section that the employees meant to be affected are those 'engaged in an economic strike who are not entitled to reinstatement,' and they deprecate the necessary impact of important recent pronouncements by the courts and the Board which . . . have significantly clarified the reinstatement of employees who have abandoned an economic strike.

Id.

As Fanning explained in Wahl, the majority was incorrect to characterize economic strikers as merely awaiting the termination of their replacements. Rather, just as laid-off employees, they await many different kinds of developments. 195 NLRB at 635. These developments can be understood to include the likelihood of a new CBA, which would provide for the strikers' immediate return to work. These developments could also include the creation of positions due to demand, the replacements' leaving of their own volition and a replacement's termination. This analysis illustrates that the possibility of reinstatement exists for an economic striker in spite of a replacement being hired.

Fanning further explained that decisions ignored by and preceding Wahl Clipper are also instructive on this point. Wahl, 195 NLRB at 637. For example, in 1967, the Supreme Court emphasized that economic strikers maintain their status as employees under the definition set

forth in 29 U.S.C. §152(3) (hereinafter Section 2), provided that certain conditions are met. N.L.R.B. v. Fleetwood Trailer Co., 389 U.S. 375, 381 (1967). The Court in Fleetwood concluded that, under this section of the Act, an economic striker who has not obtained regular and substantially equivalent employment is a statutory employee. Id. The Board echoed this interpretation in Laidlaw Corp., 171 NLRB 1366, 1367 (1968). Moreover, this interpretation finds further support in NLRB v. MacKay Radio & Telegraph Co., 304 U.S. 333, 342 (1938), in which the Court made it clear that the term "employee" "shall include **any individual** whose work has ceased as a consequence of, or in connection with, any current labor dispute." (emphasis added).

The Board should adopt the "reasonable expectancy" test which Member Fanning enunciated in Wahl Clipper, 195 NLRB at 636 (Member Fanning, dissenting). Pursuant to this test, the Board, in determining whether an individual is still a statutory "employees," would look not at whether a position exists at the time the issues arise, but whether there is an opportunity for such a position in the future. In the case at hand, the strikers are entitled to vote in any decertification election because the possibility of reinstatement still exists. Though the Company has hired replacement employees, the agreement between the Company and the replacements makes the likelihood of reinstatement of the strikers following a resolution clear. See, Union Ex. 1(a); Union Ex. 1(b). The replacements are aware of the right to reinstatement of the strikers, and the economic strikers await positions and are capable of filling them, making them per se eligible for reinstatement.

As to this latter fact, it is important to note that none of the striking employees who seek to vote have found regular and substantially equivalent employment, and therefore, under the Act and the Supreme Court's decision in Fleetwood Trailer Co., these individuals retain their rights

as statutory "employees." It is also evident that these workers are still employees who have ceased work as a consequence of a current labor dispute and maintain a protected rights status as required by the Act and MacKay. This status is protected by the right to strike enshrined in the Act, and is not simply a twelve-month right to strike.

There is also an opportunity for a position to open in the future that the strikers can occupy. There is little doubt that, under the "reasonable expectancy" test of Wahl Clipper (which should be adopted by the Board), these employees can reasonably expect that they can and will be reinstated when a position becomes available. Indeed, the language of the offers made to the replacements indicates that the Company recognizes this. Thus, the Company, by expressly maintaining the right to discharge the replacements following the strike, recognized not only the possibility but indeed the probability of the reinstatement of the striking employees in the event of a "strike settlement agreement reached" between the Company and the USW, and imparted this probability to the replacements (Report at ps. 7-8).

Finally, the fact that the strike commenced more than a year ago is irrelevant to the voting eligibility of these economic strikers. In light of legislative history, other case law, and the necessity of protection of the core right to strike under the Act, there are compelling reasons for the reevaluation of the majority decision in Wahl Clipper, and the Board should grant review in order to institute a policy designed to protect, rather than disenfranchise, union workers.

Exception 2

The USW Hereby Excepts to the Hearing Officer's Findings, Conclusions and Recommendations that the Replacements in this case are in fact "Permanent" and that their Ballots should therefore be opened and counted (Report at ps. 3-4; 7-8; 11-15; 31).

At-will employees are not entitled to vote in or file a petition for a decertification election because they are not employees under the Act. While the Act protects the right of employees (or

individuals acting on their behalf) to petition for an election to decertify a union in Section 9(c)(1), under the doctrine established in Target Rock, 324 NLRB 373 (1997), an employee must be considered permanent in order to supplant the rights of a striking employee. Though that case deals with the reinstatement of economic strikers, the doctrine is applicable to the voting rights of employees. In order for an employee to be considered permanent, there can remain no conditions to their employment. Id. at 382.

The Hearing Officer in this case of course relied upon In Re Jones Plastic & Eng'g Co. (Jones), 351 NLRB 61, 61 (2007), to argue that Target Rock is not valid precedent and that it must be ignored (Report at ps. 11-12; 14-15). However, the Union's urges the Board to follow the dissent in Jones by Members Liebman and Walsh, and take this opportunity to overrule Jones at least insofar as it could be applied to allow individuals who have replaced strikers but have been given conditional, at-will employment to vote in a representation election in lieu of the striking employees. See, Belknap, Inc. v. Hale, 463 U.S. 491, 504-505 fn. 8 (1983) (''conditional' offers the Court believed could be defended as offers of permanent employment to replacements did not include offers advising replacements that they "could be fired at the will of the employer for any reason.").

It has been well-settled for decades that the essence of an offer of permanent employment is that a position must be unconditional. Target Rock, 324 NLRB at 382. Further, a mutual understanding must exist between the Company and the replacements that the job is permanent in order for it to be so. Hansen Bros. Enterprises, 279 NLRB 741 (1986). In other words, the entirety of circumstance surrounding the positions must "show that the men who replaced the strikers were regarded by themselves *and* the [employer] as having received their jobs on a

permanent basis." Georgia Highway Express, Inc., 165 NLRB 514, 516 (1967) (emphasis added).

Proof of permanent employment must exist unambiguously. Target Rock, 324 NLRB at 373. It cannot rest solely on the terms of the offer made to the replacements; use of the term "permanent" does not make it so. Id. When a company purposefully keeps its options open towards termination, the position must be considered temporary. Id. Promises that employment may later be considered permanent following a strike are not sufficient. Id. at 376.

Members Liebman and Walsh's dissent in Jones is instructive here. The Members point out that, in that case, the employer not only told the replacements that they could be displaced by the strikers, but that they could be discharged for any reason. Jones, 351 NLRB at 70. Without evidence of a mutual understanding, a lack of commitment to replacements prevents any finding of permanence. Id.

In this case also, the replacements are temporary, at-will employees who are not entitled to vote in or petition for a decertification election. Thus, in the ostensible offer of permanent replacement, the Company maintained that the transition in status did not constitute a promise of "permanent employment." (Report at p. 8). The Company plainly maintained that they were not "permanent employee[s]". Id. The Company makes it clear in the letter that the transition does not constitute a contract and that it retained the right to terminate the replacement employees for "any lawful reason at any time," including in the event of a settlement with the Union. Id. This phrasing is identical to the language used in Clause 14 of the replacement agreement for the definition of "at-will." (Id. at ps. 8-9).

The "permanence" of employment is extremely ambiguous in this case. As just shown, the language used to explain the definition of "permanent replacement" was used to define the

term "at-will." It is clear the Company intended to maintain the right of termination over the permanent replacements; the Company even maintained the ability to discharge the permanent replacements following the strike. The use of the term "permanent" in the letter is irrelevant in the overall context of this at-will employment. As Members Liebman and Walsh recognized in Jones, the ability to terminate in this case for any legal reason precludes any possible mutual understanding of permanent replacement. This reasoning is completely consistent with the Supreme Court's decision in Belknap, supra., 463 U.S. at 504-505 fn 8 (''conditional' offers the Court believed could be defended as offers of permanent employment to replacements did not include offers advising replacements that they "could be fired at the will of the employer for any reason.").

And so, the Board should adopt the reasoning of Members Liebman and Walsh in Jones, supra., as consistent with the long-standing precedent of Belknap and find that the replacements in this case are not entitled to the voting rights provisions of Section 9(c)(1)(A) -- they should not have been allowed to vote in or petition for a decertification election, and their ballots thus should not be opened or counted.[1]

[1] However, even if the Board does not overrule the majority decision in Jones and adopt the reasoning of the dissent, the Board can nonetheless rule in favor of the Union consistent with the majority decision. This is so because the majority in Jones relied heavily for its decision on the fact that replacements were given the specific positions of specific striking employees, and that this fact was indicative of permanence. Indeed, the Jones majority pointed to the fact that many of the replacements were told the names of the individual striker they were replacing. 351 NLRB at 64. In this case, on the other hand, the Company did not notify the temporary replacements which strikers they were replacing nor were they hired to take specific positions. Rather, they were placed generally in the plant solely based on the need to survive the strike.

CONCLUSION

Under the National Labor Relations Act, economic strikers who *are entitled to reinstatement* should be eligible to vote regardless of the twelve-month limitation, contra the majority opinion in Wahl Clipper (emphasis added). Because the strikers here remain employees under the Act and are eligible for and at any time could be reinstated, their votes in the decertification election should be counted.

In a similar vein, replacements (regardless of title) are not entitled to vote or petition for a vote if they are not actually permanent employees. There must be no conditions to employment that make them at-will by the employer in order for the positions to be considered permanent. See, Belknap, supra. In this case, where the Company maintains the right to terminate the replacement employees, they are not permanent and are not protected by the Act with regard to their right to file for and vote in decertification elections.

The National Labor Relations Act was created as a means of ensuring the rights of employees to collectively bargain and to strike in support of their bargaining position. To allow temporary replacements to decertify a union representing striking employees is contrary the Act's core purposes. It makes little sense to protect replacement employees not covered under the Act, while giving economic strikers no protection. If the Board is truly worried about the "erosion of the right to organize and the danger posed to our society as a consequence," it must review its prior decisions and conclude that economic strikers must be protected under the Act

and replacement employees must not be given the same protections. Wilma B. Liebman, Decline and Disenchantment: Reflections on the Aging of the National Labor Relations Board, 28 Berkeley J. Emp. & Lab. L. 569, 589 (2007).

Respectfully submitted,

Daniel M. Kovalik
Senior Associate General Counsel
United Steelworkers
Five Gateway Center, Suite 807
Pittsburgh, PA 15222
Phone: 412.562.2518
FAX: 412.562.2574
dkovalik@usw.org

CERTIFICATE OF SERVICE

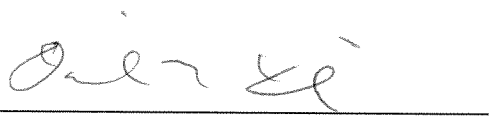
I hereby certify that on November 30, 2011 the foregoing document was filed electronically with the National Labor Relations Board in Washington, DC and copies were served on the following parties by U. S. Mail, postage prepaid:

National Labor Relations Board
Ronald K. Hooks
Regional Director
Region 26
National Labor Relations Board
The Brinkley Plaza Building, Suite 350
80 Monroe Avenue
Memphis, TN 38103-2481

Employer Counsel
Christopher Johlie
Joshua D. Meeuwse
Franczek Radelet
300 South Wacker Drive, Suite 3400
Chicago, IL 60606

Petitioner
Haden Self
37 Cardinal Cove
Columbus, MS 39705

Employer
Tob Coss
Plant Manager
OMNOVA Solutions, Inc.
133 Yorkville Road East
Columbus, MS 39703



Daniel M. Kovalik